SMT GRACY

v.

STATE OF KERALA & ANOR.

SUPREME COURT, INDIA
BC RAY J
LM SHARMA J
JS VERMA J
[WRIT PETITION (CRIMINAL) NO. 1218 OF 1990]
15 FEBRUARY 1991

CRIMINAL PROCEDURE: *Representation - Non consideration of by detaining authority, the Central Government - Even if representation is addressed only to the advisory board instead of to Central Government or also to Central Government, held, Central Government obliged to consider it independent of the opinion of the advisory board - Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 [Ind], s. 3 - Constitution of India, art. 22(4), (5).*

The detenu was arrested on the accusation of illicit cultivation of ganja plants in violation of Narcotic Drugs and Psychotropic Substances Act and his bail application was rejected. Thereafter the order of detention was served on the detenu under s. 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988. The detenu was informed that he had a right to make representation to the detaining authority, Central Government and the Central Advisory Board against the detention order. The mode of address of the representation to the Central Government and the Central Advisory Board was also indicated in the detention order along with the grounds of detention in accordance with Article 22(5). The detenu's case was subsequently referred to the central advisory board by the Central Government. During pendency of the reference before the advisory board the detenu made his representation and addressed it to the advisory board. The advisory board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it and gave the opinion that there was sufficient cause to justify his preventive detention. The Central Government then made the order confirming his detention. However, there was no independent consideration of the detenu's representation by the Central Government at any time. In the counter affidavit; the Central Government's stand was that since the representation was addressed to the advisory board and not to the Central Government there was no obligation on it to consider the same independently. Rejecting this stand of the Central Government and allowing the writ petition filed on behalf of the detenu by his mother - the Supreme Court.

Held:

[1] The nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. The obligation of the Government to consider the representation is different from, independent of and in addition to the obligation of the board to consider it at the time of hearing the reference before giving its opinion to the Government.

[2] If there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the advisory board in addition to its consideration by the

advisory board while giving its opinion. Hence, one representation of the detenu addressed only to detaining authority, being the Central Government and not also to the advisory board does not dispense with the requirement of its consideration also by the advisory board. Article 22(5) speaks of the detenu's 'representation against the order', and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the advisory board being an additional requirement implied by reading together Clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the advisory board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authorities *viz.*, the detaining authority and the advisory board, both having independent power to act on its own. Dual obligation of consideration of the detenu's representation by the advisory board and independently by the detaining authority flows from Article 22(5).

[3] The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the advisory board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.

[4] In the present case there had been a breach by the Central Government of its duty under Article 22(5) to consider and decide the representation independently of the advisory board's opinion. The order of detention as well as the order of its confirmation passed by the Central Government are, therefore, quashed. This shall not, however, affect the detenu's prosecution for the alleged offence and it shall also not be construed as a direction to release him in case he is in custody as a result of refusal of bail.

[Writ petition allowed.]

Cases referred to:

K.M. Abdulla Kunhi v. Union of India [1991] 1 SCC 476/JT [1991] 1 SC 216 ***(cit)***
Sk. Abdul Karim v. State of WB [1969] 1 SCC 433 ***(cit)***
Pankaj Kumar Chakrabarty v. State of WB [1969] 3 SCC 400/[1970] 1 SCR 543 ***(cit)***
Shayamal Chakraborty v. Commissioner of Police, Calcutta [1969] 2 SCC 426 ***(cit)***
B. Sundar Rao v. State of Orissa [1972] 3 SCC 11
John Martin v. State of WB [1975] 3 SCC 836/ [1975] SCC (Cri) 255/ [1975] 3 SCR 211 ***(cit)***
Sk. Sekawat v. State of WB [1975] 3 SCC 249/[1974] SCC (Cri) 867/[1975] 2 SCR 161 ***(cit)***
Haradhan Saha v. State of WB [1975] 3 SCC 198/[1974] SCC (Cri) 816/ [1975] 1 SCR 778 ***(cit)***

Legislation referred to:

Constitution of India [Ind], arts. 22(4), (5), 32
Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act 1988 [Ind], ss. 3, 9(f), 10(2)

[**Editor's Note:** This case was reported in the Supreme Court Cases [1991] 2 SCC and is reproduced with the kind permission of the publishers.]

JUDGMENT

JS Verma J:

This writ petition under Article 32 of the Constitution of India is by the mother of the detenu, Noor alias Babu to quash the detention order F. No. 801/1/90-PITNDPS dated 25 January 1990 passed under s. 3 of the Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act 1988 (in short 'PITNDPS Act') and the order of confirmation F. No. 8011/1/90-PITNDPS dated 24 April 1990 passed under s. 9(f) read with s. 10(2) of the PITNDPS Act, by the Central Government directing detention of the detenu for a period of two years w.e.f 30 January 1990. The only argument advanced in support of this writ petition is infraction of Article 22(5) of the Constitution of India. The facts material for the point raised are stated hereafter.

The detenu was arrested from his family estate at Kochuveetil House, Kuthugal, Udumpanchola Taluk, Idikki District, Kerala on 19 October 1989 on the accusation that he and his brothers were involved in extensive illicit cultivation of ganja plants (cannabis sativa) in violation of the provisions of Narcotic Drugs & Psychotropic Substances Act 1985 (in short 'NDPS Act'). He was produced before the Judicial Magistrate who rejected his bail application. The Sessions Judge also rejected the bail application once but later granted conditional bail. Thereafter, the detention order dated 25 January 1990 was served on the detenu on 30 January 1990. It was stated therein that even though prosecution of the detenu was likely to be initiated under the NDPS Act, there was likelihood of the detenu indulging in cultivation and production of narcotic drugs (ganja) on the detenu being released on bail on account of which there was compelling necessity to detain him under the PITNDPS Act. The detenu was informed that he had a right to make representation to the detaining authority, Central Government and the central advisory board against the detention order. The mode of address of the representation to the Central Government and the central advisory board was also indicated in the detention order along with the grounds of detention in accordance with Article 22(5) of the Constitution of India. The detenu's case was referred by the Central Government to the central advisory board on 2 March 1990. During pendency of the reference before the advisory board, the detenu made his representation on 24 March 1990 and addressed it to the advisory board. The advisory board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it. The advisory board gave the opinion that there was sufficient cause to justify his preventive detention. The Central Government then made the order dated 24 April 1990 confirming his detention and directed that the detenu Noor alias Babu be detained for a period of two years w.e.f. 30 January 1990.

It is admitted that the advisory board considered the detenu's representation before sending its opinion to the Central Government along with the entire record including the representation submitted by the detenu. It is also admitted that the Central Government made the order of confirmation dated 24 April 1990 on receipt of the opinion of the advisory board, but there was no independent consideration of the detenu's representation by the Central Government at any time. In the counter-affidavit filed initially by Shri A.K. Roy, Under Secretary to the Government of India, this fact was not clearly stated and, therefore, we directed an additional affidavit to be filed. In the additional affidavit filed by Shri A.K. Roy, it has not been disputed that the Central Government did not at any time consider independently the detenu's representation addressed to and given to the advisory board. In the additional affidavit, the stand of the Central Government in this behalf has been stated thus:

> Since the detenu in the present case has not made any representation to the Central Government, the assertion in para. 2 of the grounds of petition that no opportunity was afforded by the Central Government to the said detenu is vehemently denied. The question of consideration of a representation and providing of an opportunity would only arise when a representation is duly made to the Central Government.

On the above facts, the question is: Whether there has been any infraction of the guarantee under Article 22(5) of the Constitution as a result of Central Government's omission to consider the detenu's representation independent of its consideration by the advisory board? The Central Government's stand is that the detenu's representation being addressed to the advisory board to which it was submitted during pendency of the reference before the advisory board, there was no obligation on the Central Government also to consider the same independently since the representation was not addressed to the Central Government.

The constitutional mandate in Article 22(5) was considered recently by a Constitution Bench in *K.M. Abdulla Kunhi v. Union of India* [1991] 1 SCC 476/JT [1991] 1 SC 216, in view of some conflict in earlier decisions of this Court regarding the detaining authority's obligation to consider the detenu's representation independently of the advisory board's duty in this behalf. The Constitution Bench held as follows:

> It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the advisory board to enable it to form its opinion and send a report to the Government. *It is implicit in Clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation, cannot depend upon the views of the board on such representation. It has to consider the representation on its own without being influenced by any such view of the board. The obligation of the Government to consider the representation is different from the obligation of the board* to consider the representation at the time of hearing the references. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. *The consideration by the board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government, is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the advisory board* under Clause (4) of Article 22 read with s. 8(c) of the Act. (See: *Sk. Abdul Karim v. State of WB* [1969] 1 SCC 433; *Pankaj Kumar Chakrabarty v. State of WB* [1969] 3 SCC 400/[1970] 1 SCR 543; *Shayamal Chakraborty v. Commissioner of Police, Calcutta* [1969] 2 SCC 426; *B. Sundar Rao v. State of Orissa* [1972] 3 SCC 11; *John Martin v. State of WB* [1975] 3 SCC 836/[1975] SCC (Cri) 255/[1975] 3 SCR 211; *Sk. Sekawat v. State of WB* [1975] 3 SCC 249/[1974] SCC (Cri) 867/[1975] 2 SCR 161; and *Haradhan Saha v. State of WB* [1975] 3 SCC 198/[1974] SCC (Cri) 816/[1975] 1 SCR 778. (Emphasis supplied)

It is thus clear that the obligation of the Government to consider the representation is different and in addition to the obligation of the board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the advisory board. In short, the detenu's right to have the representation considered by the Government under Article 22(5) is independent of the consideration of the detenu's case and his representation by the advisory board. This position in law is also not disputed before us.

The learned solicitor general, however, contended that in the present case there being no representation addressed to the Central Government, the only representation made by the detenu being addressed to the advisory board during pendency of the reference, there was in fact no representation of the detenu giving rise to the Central Government's obligation to consider the same. The question is: Whether this contention can be accepted in the face of the clear mandate in Article 22(5) of the Constitution?

It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the advisory board in addition to its consideration by the advisory board while giving its opinion. In other words, one representation of the detenu addressed only to the Central Government and not also to the advisory board does not dispense with the requirement of its consideration also by the advisory board. The question, therefore, is: Whether one of the requirements of consideration by Government is dispensed with when the detenu's representation instead of being addressed to the Government or also to the Government is addressed only to the advisory board and submitted to the advisory board instead of the Government? On principle, we find it difficult to uphold the learned solicitor general's contention which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Article 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implies the duty to consider and decide the representation when made, as soon as possible. Article 22(5) speaks of the detenu's 'representation against the order', and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the advisory board being an additional requirement implied by reading together Clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the advisory board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authorities *viz.*, the detaining authority and the advisory board, both having independent power to act on its own.

It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the advisory board and independently by the detaining authority flows from Article 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of this obligation merely because the representation is addressed to the advisory board instead of the detaining authority and submitted to the advisory board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Article 22(5) in support of the contention of the learned solicitor general. The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the advisory board or to both. The mode of address

is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.

We are, therefore, unable to accept the only argument advanced by the learned solicitor general to support the detention. On this conclusion, it is not disputed that there has been a breach by the Central Government of its duty under Article 22(5) of the Constitution of India to consider and decide the representation independently of the advisory board's opinion. The order of detention dated 25 January 1990 as well as the order dated 24 April 1990 of its confirmation passed by the Central Government are, therefore, quashed. This shall not, however, affect the detenu's prosecution for the alleged offence and it shall also not be construed as a direction to release him in case he is in custody as a result of refusal of bail. The writ petition is allowed, accordingly.

Also found at [1991] 3 CLJ 2048